

STATE OF MICHIGAN
COURT OF APPEALS

PAUL F. NOWITZKE,

Plaintiff-Appellant,

v

JOHNSTON ACQUISITION CORPORATION,
d/b/a EAGLE TRAILERS and ROBERT R.
JOHNSTON,

Defendants-Appellees.

UNPUBLISHED

March 4, 2003

No. 238481

Wayne Circuit Court

LC No. 00-027187-CL

Before: Kelly, P.J., and White and Hoekstra, JJ.

WHITE, J. (*dissenting*).

I respectfully dissent. I conclude that plaintiff presented sufficient evidence that defendants regarded him as having a disability under MCL 37.1103(d)(iii) to survive summary disposition, and would reverse.

Plaintiff did present evidence below that Johnston believed plaintiff's heart condition limited his present ability to perform a broad range of jobs. Johnston testified at deposition that when he laid plaintiff off in December 1997, plaintiff inquired whether he could take the night foreman/third-shift supervisor position, and he, Johnston, responded that plaintiff was not capable of handling the night foreman position. It is undisputed that plaintiff had held the night foreman position for years before his second heart attack in 1997. Plaintiff also submitted evidence that less than two months after laying him off, defendant hired a person off the street through a classified ad in the newspaper to take the night foreman position. Also submitted below (under seal) were defendant's payroll records showing that in the year following plaintiff's lay-off, defendant hired numerous persons to fill a number of different types of positions, yet did not recall plaintiff to work.¹ This despite the fact that Johnston testified at deposition that plaintiff was capable of performing "any job in the plant." Thus, I conclude that plaintiff presented ample evidence from which a factfinder could infer that defendants regarded plaintiff as presently having a heart condition that substantially limited the major life activity of

¹ Defendants assert that they did offer plaintiff employment, in the form of contract work driving a truck. Notwithstanding, I conclude that a question of fact remained whether defendants considered defendant's heart condition presently limited his ability to perform a broad range of jobs.

working, and regarded plaintiff as unable to perform a wide range of jobs. *Michalski v Bar-Levav*, 463 Mich 723, 733; 625 NW2d 754 (2001); *Chiles v Machine Shop, Inc*, 238 Mich App 462, 477-479; 606 NW2d 398 (1999).

I would reverse.

/s/ Helene N. White